U.S. SMALL BUSINESS ADMINISTRATION
WASHINGTON, D.C. 20416

OFFICE OF CHIEF COUNSEL FOR ADVOCACY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Tariff Filing Requirements for Nondominant Common Carriers	)	CC Docket No. 93-36

Motion of the Small Business Administration Office of Advocacy For Leave to File Comments Out of Time

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The Office of Advocacy respectfully requests leave from the Federal Communications Commission (hereinafter Commission) to file the attached document as a formal letter on March 30, 1993. The grounds for this motion are:

1. The Office of Advocacy received new information on March 29, 1993, the date of filing. The additional information helped provide a more detailed and accurate description of the issues addressed in the notice of proposed rulemaking and their impact on small businesses. Incorporation of this material made it impossible for the Office of Advocacy to meet the March 29 deadline. The Office of Advocacy, as the federal agency designated to represent the interests of small businesses before other federal agencies, believes that its views on this subject

will be of extreme value to the Commission and to other interested parties.

2. Filing of the comments has been due to the need for review and coordination within the Office of Advocacy.

3. Acceptance fo these comments will neither prejudice any party not delay resolution of this proceeding.

Pursuant to 47 C.F.R. § 1.46, and for the foregoing reasons, the Office of Advocacy requests that the Commission accept the attached as a formal comment letter.

Respectfully submitted,

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Acting Chief Counsel for Advocacy

Barry Pineles, Esq.
Assistant Chief Counsel

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Comments of the Chief Counsel for Advocacy of the United States Small Business Administration on the Notice of Proposed Rulemaking

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March 29, 1993

Before the
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In the Matter of	)	
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Tariff Filing Requirements for Nondominant Common Carriers	)	CC Docket No. 93-36

Comments of the Chief Counsel for Advocacy
of the United States Small Business Administration
on the Notice of Proposed Rulemaking

I. *Introduction*

On February 19, 1993, the Federal Communications Commission (FCC or Commission) issued a notice of proposed rulemaking to address tariff filing requirements for all carriers other than AT&T and local exchange carriers (LECs). In the Matter of Tariff Filing Requirements for Nondominant Common Carriers, CC Docket No. 93-36, FCC 93-103 (NPRM). The Commission initiated this proceeding in response to a D.C. Circuit decision[1] holding that the FCC's current tariff filing scheme for nondominant carriers violates the Federal Communications Act of 1934, 47 U.S.C. §§ 151-609 (Act).

The Act requires the Commission to regulate the interstate transmission of wireline telecommunication services to ensure that rates are just, reasonable and nondiscriminatory. *Id.* at

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[1] AT&T v. FCC, 978 F.2d 727 (D.C. Cir. 1992).

§ 201. The Act requires that every common carrier "shall ... file with the Commission ... schedules showing all charges for itself and its connecting carriers for interstate ... wire ... communication...." *Id.* at § 203(a).

In 1979, the Commission instituted the *Competitive Carrier* proceeding[2] to reexamine the "mandatory" nature of the tariff filing requirement specified in § 203. This reexamination resulted from the advent of competition in the interstate long-distance[3] market during the 1960's and 1970's and the FCC's recognition that its regulatory regime was not designed to accommodate these competitors.

The various orders in the *Competitive Carrier* proceeding resulted in the separation of interstate interexchange carriers into two classes -- dominant and nondominant. AT&T was the only interexchange carrier classified as dominant.[4] At first, the FCC only streamlined various requirements such as reducing to 14

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[2] That proceeding lasted for six years and went through six reports and orders. The sixth report and order was overturned by the D.C. Circuit in MCI Telecommunications v. FCC, 765 F.2d 1186 (D.C. Cir. 1985).

[3] After the divestiture of the Bell Operating Companies (BOCs) by AT&T, it became more accurate to differentiate between interexchange service, from which the BOCs were prohibited from

days the amount of time needed before a new rate went into effect.[5] Further streamlining occurred in later parts of the proceeding culminating in the adoption of the Commission's forbearance doctrine.

The forbearance doctrine allowed nondominant carriers to forgo the filing of tariffs if they so desired. The FCC adopted this policy because nondominant carriers had no market power. Without such power, these carriers could not impose unjust, unreasonable, or discriminatory rates. Since these carriers could not charge rates that violated the Act, the Commission found no reason to require them to file rates prior to their institution.

Without reiterating the details, AT&T challenged[6] the forbearance doctrine before the FCC. The FCC evaded ruling on the issue which did not sit well with AT&T and the company appealed the failure to act to the D.C. Circuit. In *AT&T v. FCC*, 978 F.2d 727 (D.C. Cir. 1992), the court first rejected the Commission's explanations for its failure to act on AT&T's

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[5] The Commission has the authority to suspend any rate filed by a carrier and determine whether that rate is unjust, unreasonable or discriminatory. 47 U.S.C. §§ 204, 208. The reduced waiting period between filing and the effective date of the rate dramatically lowered the probability that the Commission would exercise its suspension power.

[6] The Act permits persons other than the Commission to seek suspension and investigation of rates.

petition. *Id.* at 733. The court then found that the forbearance doctrine violated the clear language of § 203 and remanded the case to the Commission to impose mandatory tariff filing requirements on all carriers be they dominant or nondominant. *Id.* at 736.

II. *The Interexchange Industry*

Interexchange carriers (IXCs) provide telephone links between LECs. These services are provided either by the few companies that construct their own networks (facility-based) or the vast majority of companies that lease bulk capacity transmission circuits from facility-based carriers and sell the service over the leased capacity (resellers). Filings with the FCC's Common Carrier Bureau reveal that about 482 carriers purchased switched access from LECs.[7]

Three large companies, AT&T, MCI, and Sprint, account for more than 90% of the revenues and switched access minutes of use in the IXC industry. Each of these companies is well known with revenues in the billions of dollars. A number of other, less well-known companies, such as LDDS, have been involved in a consolidation of the industry creating a second tier of large companies although small in comparison to AT&T, MCI, and Sprint.

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[7] This figure denotes that an IXC needed to purchase transmission from a LEC to either initiate a call or end a call.

The vast majority of the 482 carriers constitute a third tier of carriers with revenues of less than 25 million dollars and each carrier's percentage of the market is barely measurable.

Most IXCs do not try to serve all markets or try to provide the complete panoply of interexchange services offered by AT&T, Sprint, and MCI. Rather they tend to focus their efforts on niche markets, either by geographic location or type of customer.[8] Many small businesses utilize the services of these small IXCs to obtain rates and services that otherwise would be unavailable to them from the largest IXCs.

III. *The Impact of Tariff Filings on Small IXCs*

Current requirements for filing of tariffs are quite complex and mainly apply to dominant carriers. These carriers must file detailed cost information in support of the tariff including but not limited to a cost of service study for all elements in the tariff for the preceding 12 month period,[9] a study of projected costs for a 12 month period, and a projection of revenues for an upcoming 12 month period. 47 C.F.R. § 61.38(b)(1)(i-ii). These cost studies are in addition to the tariff filings themselves

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[8] For example, Metromedia Communications, which will merge with LDDS later this year, advertises that it only serves business customers.

[9] Tariffs may have as few as one element or as many as 50,000.

which must include the rates for each element or subelement or both and may run to hundreds of pages. *Id.* at § 61.54.

The administrative costs associated with these tariff filings, especially for small IXCs which cannot pass these costs onto customers, represent a significant burden that diverts scarce capital from developing new services, markets, and technologies. The Commission recognizes the potential costs associated with tariff filings and prepared an initial regulatory flexibility analysis pursuant to the Regulatory Flexibility Act, 5 U.S.C. § 611-12 (RFA). NPRM at Appendix B.

The Office of Advocacy commends the FCC for determining that tariff filings will have a significant economic impact upon a substantial number of small entities. The Office of Advocacy agrees with the Commission that the costs of meeting current tariff filing requirements for all but the largest IXCs constitutes a prohibitive expense that may doom their ability to compete in the interexchange market.

IV. *Alternatives to Current Filing Requirements*

In the NPRM, the FCC seeks to reduce, to the extent made possible by the D.C. Circuit's decision, the burdens that will be imposed on nondominant carriers. Thus, the Commission tentatively concludes that current filing requirements are

inappropriate for use by nondominant IXCs and seeks to streamline the tariff filing requirements for these carriers. *Id.* at ¶ 11. The Commission's proposed changes in the tariff notice requirements, permit the use of maximum rates or range of rates for tariff filings, permit filings on computer disk, and provide substantial discretion to carriers in formatting their tariff filings. *Id.* at ¶ 13.

In its initial regulatory flexibility analysis, the Commission opines that these changes are designed to substantially reduce the burdens associated with the statutory requirement of filing tariffs. The Office of Advocacy concurs and fully supports the proposed rules.

The Commission proposes to permit nondominant carriers to file either maximum rates for particular services or a range of rates for each service. The Office of Advocacy supports the use of a maximum range but understands that the language of the Communications Act in combination with the filed rate doctrine may make it difficult for nondominant interexchange carriers to file maximum rates.[10]

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[10] The filed rate doctrine requires a carrier, be it a telephone company, motor carrier, ocean-going vessel, or natural gas pipeline to charge the rate specified in the tariff. Maislin Indus. v. Primary Steel, Inc., 110 S. Ct. 2759, 2766 (1990). The Act requires that tariff filings include "all charges for itself...." 47 U.S.C. § 203(a). An argument could be made that a nondominant carrier that seeks to charge a customer with a rate

(continued...)

Should the Commission determine that it does not have authority to permit maximum rates, then the Office of Advocacy recommends that the FCC permit nondominant carriers to file tariffs that utilize a range of rates. Nondominant carriers would have the right to charge any rate within that range without running afoul of the filed rate doctrine. *Cf. Central & Southern Motor Freight Tariff Association v. United States*, 273 F. Supp. 823, 832 (D. Del. 1967) (range of rates dependent upon freight tonnage does not violate filed rate doctrine under the Interstate Commerce Act).[11]

Although the Office of Advocacy fully endorses the Commission's efforts to reduce the regulatory burdens on IXCs,

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[10](...continued)
less than that on file with the FCC would, according to the filed rate doctrine, have to file a new tariff (this is the current procedure utilized by the Federal Maritime Commission for non-operating vessel common carriers).

However, the Office of Advocacy is not convinced that the filed rate doctrine forecloses the Commission's adoption of a maximum rate. Court cases have not addressed the issue of maximum rates under the filed rate doctrine and no court case addresses the filed rate doctrine in the context of the Act. Furthermore, the FCC adopted a form of maximum rate filings -- price caps. The Commission must believe that the rate band flexibility inherent in price caps does not violate the filed rate doctrine. Thus, precedent exists for the Commission to at least consider implementing a maximum rate tariff filing for nondominant carriers despite the existence of the judicially created filed rate doctrine.

[11] The tariff provisions of the Interstate Commerce Act and the Communications Act of 1934 are similar and interpretations of the Interstate Commerce Act have significant precedential value in interpreting the Communications Act. ABC v. FCC, 643 F.2d 818, 820-21 (D.C. Cir. 1980).

the Office of Advocacy also suggests that the FCC take this opportunity to completely reexamine its regulatory structure for the industry.[12] Perhaps, the Commission, as it did for LECs, could establish separate tiers for the IXCs. Within each tier, tariff filing requirements would be established consonant with the size of the IXCs within that tier.[13] The largest IXCs would have the most explicit filing requirements thereby reducing the amount of § 208 litigation before the FCC. Smaller IXCs would then be required to provide only minimal information on their tariffs.

Tiering of IXCs for tariff filing requirements represents only one possible alternative for reducing the regulatory burdens on small IXCs. Other potential solutions exist and the Commission should utilize the entire panoply of analytical tools provided by the RFA to examine each one.

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[12] The Office of Advocacy called for just such a reexamination in another proceeding before the Commission. In the Matter of Competition in the Interstate Interexchange Marketplace, CC Docket No. 90-132, Comments of the Chief Counsel for Advocacy at 30-31 (July 3, 1990).

[13] Both the courts and the Act permit the Commission to establish different tariff standards for different classes of carriers. 47 U.S.C. § 203(b)(2). *See* MCI v. FCC, 765 F.2d 1186, 1192 (D.C. Cir. 1985); MCI v. TCI, Mail, Inc., 772 F. Supp. 64, 66 (D.R.I. 1991).

V. *Conclusion*

The Office of Advocacy supports the initiation of this proceeding. Current tariff filing requirements are onerous and aimed at dominant carriers not small IXCs trying to carve a niche in a oligopolistic market dominated by three firms. The Office of Advocacy concurs with the FCC's tentative conclusion that the changes proposed in the NPRM will reduce the regulatory burdens faced by small IXCs. However, the Office of Advocacy opines that the FCC can do more. A complete reexamination of the regulatory structure of the IXC industry may result in even further reductions in burdens faced by small IXCs. Full compliance with the both the letter and spirit of the Regulatory Flexibility Act will greatly assist the Commission in finding a reasonable framework for the mandatory tariff filing requirements mandated by the D.C. Circuit's interpretation of § 203 of the Communications Act.

Respectfully submitted,

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